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The Commercial Felony Streaming Act: The Call For Expansion of Criminal Copyright Infringement

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The Commercial Felony Streaming Act: The Call for Expansion of Criminal Copyright Infringement

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I. INTRODUCTION

In 2006, some staggering viewership numbers showed the evolution of how the Internet has changed everyone's perspective on viewing and uploading videos online. YouTube reported that viewers watched more than 100 million videos per day on its site.¹ In addition, a measuring site called *Hitwise* reported that 29% of all online videos were hosted by YouTube, and that 60% of all videos watched online were also available on YouTube, according to the company itself.² However, live streaming has also been on the rise due to technology evolving at breakneck speeds. For example, Twitch.tv, a popular live streaming website, has reported some of their numbers on their website, boasting their growth of over 12 billion minutes watched per month outside of the United States.³ At the bottom of Twitch's webpage that boasts their viewership numbers is a thank you to their viewers and includes final statistics that are incredible, including 100 million unique viewers per month, 1.5 million unique broadcasters per month, and 11 million total video broadcasts per

1. Reuters, *YouTube Serves Up 100 Million Videos a Day Online*, USA TODAY (July 16, 2006, 9:56 PM), http://usatoday30.usatoday.com/tech/news/2006-07-16-youtube-views_x.htm.

2. *Id.*

3. *Two Thousand MOREteen*, TWITCH, <http://www.twitch.tv/year/2014> (last visited Apr. 3, 2016).

month.⁴

Nevertheless, what do these statistics have to do with copyright law? These statistics represent an emerging industry that will be affected by the call to expand criminal copyright infringement. An amendment to Title 18 of the United States Code § 2319 (1997), in the form of proposed United States Senate Bill 978 (2011) (S. Bill 978), or the “Commercial Felony Streaming Act,” has proposed to change unauthorized streaming from a misdemeanor to a felony.⁵ This proposition has led to the issue of the possible expansion of the criminalization of copyright infringement to these live streaming websites, giving copyright owners the means to prosecute infringers on said websites. Although there have been some cases where companies have gone after a copyright infringer, most of the time, companies have decided to either license their content to stream or not to pursue infringers at all.⁶

However, the burning issue is whether proposed legislation like S. Bill 978 is even needed. Despite analyzing its pros and cons, ultimately, the proposed bill to expand criminal copyright infringement seems to be redundant in the case of live streaming and the law. In fact, the bill would not provide the legislative clarity for the public performance provision of the Copyright Act that the Seventh Circuit desired and welcomed. In the future, the better approach may be to proactively seek better ways to clarify current copyright laws in ways that do not also impede access to online content, so that the courts can better regulate copyrighted content.

First, this Comment will concisely present the differences between downloads, streaming, and live streaming, which is what legislatures have been trying to penalize further, in Section II. In Section III, this Comment will analyze what Congress has done in terms of laws that reflect the current state of copyright law as a whole and their respective expansions and penalties. The analysis will also serve as a guide as to how Congress has ultimately shown to be reactive versus proactive in the race against copyright infringers. In Section IV, this Comment will continue by introducing the proposed United States Senate Bill, S. Bill 978, and lay out the amendments it intends to make. Again, the purpose of S. Bill 978 is to further strengthen penalties tied to said legislation as well. In addition, this section will also analyze the pros and cons of the Commercial Felony Streaming Act, and how it might influence the future of live streaming. However, it is important to determine further if the current laws are sufficient in regards to the criminalization of copyright infringers, and

4. *Id.*

5. S. 978, 112th Cong. (2011).

6. *RIAA v. The People: Five Years Later*, ELECTRONIC FRONTIER FOUND. (Sept. 30, 2008), <https://www.eff.org/wp/riaa-v-people-five-years-later>.

how the current laws affect everyday users of the Internet; this analysis begs the question if an expansion or strengthening of criminal copyright infringement law is even necessary. Lastly, Section V will be a short conclusion and overview of the Comment that will take into account factors from a personal perspective, which will ultimately form a determination of whether S. Bill 978 is an appropriate action to take to combat against copyright infringers.

II. DOWNLOADS VS. STREAMING VS. LIVE STREAMING

Currently, criminal copyright infringement has the ability to deal with infringing downloads and issue takedowns for copyrighted content that can be streamed. The issue presented in this Comment shows how the proposed bill, Senate 978 bill, will expand criminal copyright infringement to include live streaming. For clarity, this section will deal with differentiating downloads, streaming, and live streaming. It should be noted that this section is only to inform how these technologies function in a general way.

Traditional downloading from the Internet is simple. A user opens a web browser to connect to the Internet, and when the user finds the file they want to download, they send a request via the browser to a server, a central computer that responds accordingly to requests, with the file on it.⁷ The server receives the request and the request is handled by a protocol, or a set of rules that help the server act accordingly.⁸ Finally, the server sends a copy of the file back to the user.⁹

Moving forward, YouTube videos are somewhat similar to the traditional downloading process. A user utilizes a Web browser to send a request to a data center, which routes the request to YouTube's servers.¹⁰ YouTube's servers send the video requested by the user in the best format available to the user and then the user can watch the video on YouTube's website.¹¹

Finally, live streaming is similar to how YouTube works, except when a user requests for a live stream, the Web server sends a message to a streaming server.¹² The streaming server streams the file directly to the user, bypassing

7. Carmen Carmack, *How Bittorrent Works*, HOWSTUFFWORKS (Mar. 26, 2005), <http://computer.howstuffworks.com/bittorrent.htm>.

8. *Id.*

9. *Id.*

10. Jeremy Scott, *How Does YouTube Work? Time Warner Infographic Breaks It Down*, TUBULAR INSIGHTS (Sept. 15, 2010), <http://www.reelseo.com/how-youtube-works-infographic/>.

11. *Id.*

12. Tracy V. Wilson, *How Streaming Video and Audio Work*, HOWSTUFFWORKS (Oct. 12, 2007), <http://computer.howstuffworks.com/internet/basics/streaming-video-and-audio3.htm>.

the Web server, using protocols that allow transfer of data in real time.¹³ In addition, those recording their live stream using the right streaming equipment can digitize, compress, and encode their video in real time, while uploading it to the streaming server.¹⁴ This allows the streamer to record and the user to watch in real time.¹⁵

III. CURRENT LAWS

At the very least, Congress seems to react in cases of copyright infringement that pose severe problems for the copyright owners. In this section, said cases are explored further and show how Congress has approached the expansion of copyright laws and the strengthening of penalties of copyright infringement. The current laws presented respectively reflect the progression of copyright law to the technology explained in the preceding section, i.e. downloading, streaming, and live streaming.

A. No Electronic Theft Act

The No Electronic Theft Act (NET Act) is primarily focused on downloads, especially one based on commercial interests. As mentioned before, laws do not necessarily accommodate every aspect of new and developing technology. The NET Act also failed to anticipate how downloading technology would evolve. For example, a certain Massachusetts Institute of Technology student found a loophole to the NET Act and subsequently had this loophole named after himself, coined as the LaMacchia Loophole.¹⁶ The loophole involved the narrow scope of copyright law of that time, in which the court could not prosecute under a wire fraud theft statute, but rather could prosecute him under the Copyright Act.¹⁷ At the time, the Copyright Act lacked the sufficient means to prosecute LaMacchia under criminal law for his encouraging of uploading and downloading copyrighted content onto the electronic board he created, specifically because LaMacchia did not have the motive of profiting from the use of the copyrighted content.¹⁸ In order to remedy this loophole, the NET Act was passed in 1997, amending several sections of the United States Code to include non-profit or non-commercial copyright infringement.¹⁹

Currently, the NET Act does not have an impact on live streaming itself.

13. *Id.*

14. *Id.*

15. *Id.*

16. Eric Goldman, Comment, *A Road to No Warez: The No Electronic Theft Act and Criminal Copyright Infringement*, 82 OR. L. REV. 369, 371–74 (2003).

17. *United States v. LaMacchia*, 871 F. Supp. 535, 545 (D. Mass. 1994).

18. *Id.* at 540–45.

19. Goldman, *supra* note 16, at 374–76.

However, it should be noted that the NET Act does still partially work due to the possibility of a user to download and record live streams, which would fall under the NET Act's scope. But, is the NET Act effective in its capacity to charge these users for criminal copyright infringement? There are a handful of cases and examples of the NET Act being used to prosecute infringing users, but ultimately there have only been eight prosecutions in five years, showing that the NET Act has been relatively unused in prosecuting criminal copyright infringers.²⁰

As stated in the NET Act's synopsis, the NET Act amends "the provisions of titles 17 and 18, United States Code," as an expansion of criminal infringement of copyrights as well as an increase in copyright protection.²¹ The NET Act specifically amends 17 U.S.C. §§ 101, 506, and 507 and 18 U.S.C. §§ 2319 and 2320.²² In regards to how the amendments currently affect streaming, the language in 17 U.S.C. § 101 now defines "financial gain" as anything that "includes receipt, or expectation of receipt, of anything of value, including the receipt of copyrighted works."²³ The amendment to § 101 does not limit its expansion to live streaming, but many other forms of "receipt," such as downloading, peer-to-peer sharing, embedded videos, etc.²⁴ In addition to § 101's expanded definition of "financial gain," the NET Act also amended § 507(a) to increase the statute of limitations from "three" to "five" years in regards to how long a plaintiff can maintain a criminal proceeding under the title.²⁵ As for the other amendments, like § 506 and 18 U.S.C. § 2319 and § 2320, the NET Act amends the other sections to emphasize and accommodate any non-commercial infringement.²⁶ As a result of the LaMacchia Loophole, the NET Act remedied the narrow scope of copyright law to become much broader.

B. Digital Millennium Copyright Act

In terms of familiarity, it seems obvious that the Digital Millennium Copyright Act (DMCA), since its enactment in 1998, has affected Internet users with greater impact than other efforts to police and deter criminally infringing

20. Eric Goldman & Julia Alpert Gladstone, *'No Electronic Theft Act' Proves a Partial Success*, ERIC GOLDMAN (Mar. 17, 2003), <http://www.ericgoldman.org/Articles/nljnetact.htm>.

21. No Electronic Theft Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997) (codified as amended 17 U.S.C. § 101 (2012)).

22. *Id.*

23. 17 U.S.C. § 101 (2012). "In 1997, the No Electronic Theft (NET) Act amended section 101 by adding the definition for "financial gain." Pub L. No. 105-147, 111 Stat. 2678. *Id.* n. 9.

24. No Electronic Theft Act § 2(a); 17 U.S.C. § 101 (2012).

25. No Electronic Theft Act § 2(c).

26. *Id.*

copyrighted content. Simply put, the DMCA amended “Title 17, United States Code, to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty (the WIPO Treaties), and for other purposes.”²⁷

To clarify, the focus on the relationship falls on the DMCA’s “other purposes” language, specifically in Title II of the DMCA, which is known as the Online Copyright Infringement Liability Limitation Act (OCILLA).²⁸ What the OCILLA implements within the DMCA is protection for Internet Service Providers (ISPs) and some web hosts from any infringing copyrighted content that was received on their website or servers, usually by a third-party user.²⁹ It should be noted that in terms of live streaming, both the live streamer and the web host are both likely to be protected, but they are also responsible for the content they are live streaming, including any criminal actions that are not protected under OCILLA.³⁰ In addition, there is no safe harbor provision for any criminal action committed in the course of live streaming the content as well.³¹ Of course, the protection is conditioned upon the ISP or web host having no actual knowledge or prior knowledge to the infringing copyrighted content being posted or embedded onto the website.³² Moreover, when the copyright owner notifies the ISP or web host of the infringing copyrighted content on the website, it must be removed or access to it must be removed within a certain timeframe, and failure to do so can result in a messy lawsuit.³³ Per the DMCA, the copyright owner must also follow the six guidelines listed for proper notification in order to have an ISP or web host remove or remove access to the copyrighted material.³⁴

Alternatively, the user that uploaded, embedded, or posted the infringing copyrighted content can give a counter notification to the ISP or web host, either after being notified by the ISP or web host, or simply by observation, and the user must also follow the four guidelines listed per the DMCA for a proper counter notification.³⁵ In addition, similar to the notification from a copyright owner, the ISP or web host must also replace or allow access to the material

27. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2861 (1998) (codified as amended at 17 U.S.C. § 512 (1998)).

28. *Id.* tit. II.

29. *Id.* tit. II, § 202; *see also* 17 U.S.C. § 512(a) (2012).

30. *See generally* Digital Millennium Copyright Act tit. II.

31. *Id.*

32. *Id.* tit. II, § 202; 17 U.S.C. § 512(a) (2012).

33. Digital Millennium Copyright Act tit. II, § 202; 17 U.S.C. § 512(a) (2012).

34. *Id.*, *see also* 17 U.S.C. § 512(c)(3)(A)(1)–(4) (2012).

35. *Id.*; *see also* 17 U.S.C. § 512(g)(3) (2012).

that the counter notification claims to be wrongfully taken down.³⁶

Lastly, the OCILLA allows copyright owners to request a subpoena for infringers in the event that the dispute over the alleged copyright material escalates to a potential lawsuit.³⁷ The DMCA also lists the type of relief a copyright owner can get, which is limited to the remedies listed in the OCILLA.³⁸

In a way, the DMCA creates a situation similar to phone tag, where the ISP is the telephone, though, ironically, most ISPs provide phone service as well, between the user who uploaded the alleged infringing copyrighted content and the copyright owner. As mentioned above, most people who use the Internet can most likely experience firsthand a DMCA takedown through YouTube. When scrolling down the YouTube page, when a user clicks on the “Copyright” hyperlink there is an option to give YouTube notice of potentially infringing copyrighted works on their site.³⁹ The page provides parties on either side of the “telephone,” which is YouTube in this case, to provide either a copyright infringement notice or a counter notification if a user has uploaded content thought to be either original or within a fair use defense.⁴⁰ Again, sometimes users experience DMCA takedowns when YouTube complies with a copyright infringement notice and, for example, a video is muted for using copyrighted music, or when a video is deleted or no longer available because the video itself was copyrighted, like Hollywood directed movies and the like.⁴¹ In the case of live streaming, if there is infringing copyrighted material, it becomes somewhat impossible to go through with the DMCA takedown notice, because the damage was already done. However, if there is a recording of the stream, then the DMCA could apply in that case.

C. Case Law

Currently, live streaming is a relatively new concept and the technology to live stream has only recently become more developed causing courts to have limited experience with this new way to consume online content. Many courts have dealt with all kinds of challenges when parties present creative arguments in an attempt to go outside of the scope of the Copyright Act. Although there is a limited amount of cases that have been litigated, courts seem to want legislative clarification before they extend the scope of copyright infringement

36. *Id.*

37. *Id.*; *see also* 17 U.S.C. § 512(h) (2012).

38. Digital Millennium Copyright Act tit. II.

39. YouTube’s copyright takedown notice webpage is available at *Copyright on YouTube*, YOUTUBE <https://www.youtube.com/yt/copyright/> (law visited March 26, 2015).

40. *Id.*

41. *Id.*

liability, if you consider the outcomes of the following cases.

For example, the Seventh Circuit discussed when a copyrighted work is infringed and when it is being “performed publicly” by providing two possible interpretations.⁴² The first interpretation is based on when any copyrighted content is uploaded onto the Internet and the public becomes able to view it, while the second interpretation is based on when the video is viewed at the discretion of the viewer.⁴³ In the end, the Seventh Circuit clearly asks for a legislative clarification on the public-performance provision of the Copyright Act, and ultimately ruled that neither interpretation would help the appellee in their argument of contributory liability for copyright infringement.⁴⁴

In another example, there are two cases at opposite sides of the spectrum regarding liability that attaches to web hosts that are potentially linking users to websites that are live streaming copyrighted material. On one side, the government cracked down hard on one Yonjo Quiroa, a 28-year-old male who ran several websites that linked users to websites live streaming broadcasts of sports games.⁴⁵ The complaint filed against Quiroa stated that he “willfully” and “knowingly” violated copyright law for the purposes of commercial and private financial gain through the sports streaming link sites that Quiroa was running.⁴⁶ Apparently, Quiroa plead guilty to the charges of a copyright misdemeanor and was deported back to his home country after paying his \$25 in criminal penalties setting a precedent for web hosts who lead users to infringing websites.⁴⁷

On the other side of the spectrum, the government seized many web domains from Rojadirecta.org, to which the web domains were eventually returned due to a Second Circuit case.⁴⁸ The government moved to dismiss after particular circumstances of the case were found to conflict with the recent *WPIX, Inc. v. ivi, Inc.* decision, which held that a paid online service that broadcasts live content to subscribers is considered a “cable system” that

42. *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 760 (7th Cir. 2012).

43. *Id.* at 761.

44. *Id.* at 761–62.

45. Complaint, *United States v. Quiroa*, Fed. App’x, No. 1:12-cr-00582-RLE, 2012 WL 10376958, at 1–14.

46. *Id.*

47. Ernesto Van der Sar, *Link ‘Pirate’ Sentenced To Pay \$13,000 to NBA, NFL, NHL, WWE, and TNA*, TORRENTFREAK (Oct. 30, 2012), <https://torrentfreak.com/streaming-site-admin-sentenced-to-pay-13000-to-nba-nfl-nhl-wwe-and-tna-121030/>.

48. Defendant’s Reply Motion at 5, *United States v. Rojadirecta.org*, (No. 11-cv-04139-PAC), 2011 WL 8200847, at *5, *dismissed*, (S.D.N.Y. Aug. 29, 2012); *see also* Joyce E. Cutler, *Government Drops Domain Seizure Case Against Rojadirecta Streaming Websites*, BLOOMBERG BNA (Sept. 13, 2012), <http://www.bna.com/government-drops-domain-seizure-case/>.

compels the web host to obtain a compulsory license under the Copyright Act.⁴⁹ Per the conclusion of the *Rojadirecta.org* case, it seems that the web hosts, like the one that owns *Rojadirecta.org*, are unlikely to be liable for copyright infringement or any secondary liability through the website's focus on "bookmarking" infringing content on third-party websites.⁵⁰ Between both examples, courts seems to struggle to find a bright line between establishing liability for leading users to third-party websites that potentially are illegally streaming copyrighted content.

Overall, case law involving live streaming and streaming media content is still developing and the cases above are only the tip of the iceberg. Clearly, between the two cases with similar facts, but different outcomes, there is a need for clarification. Whether this comes through legislation like the Commercial Felony Streaming Act or through a first impression case will be revealed in time. Ultimately, the courts should be observed more closely in the upcoming years as live streaming becomes more popular and potentially an issue in the near future.

IV. THE COMMERCIAL FELONY STREAMING ACT

A. Senate Bill 978

Senate Bill 978, also known as the Commercial Felony Streaming Act (CFS Act), was first introduced in May 2011 and sponsored by Minnesota Senator Amy Klobuchar, Delaware Senator Chris Coons, and Texas Senator John Cornyn.⁵¹ According to the bill's synopsis, the CFS Act intends to amend the current language to the criminal copyright infringement provisions.⁵² Specifically, the bill aims to amend Title 18 United States Code § 2319, which involves the criminal infringement of a copyright.⁵³ Section 2391's current penalties are "imprisonment not more than 5 years, or fined in the amount set forth in this title, or both, if the offense consists of the reproduction or distribution, including by electronic means."⁵⁴ However, should Congress pass the bill, the CFS Act would amend the language to "imprisonment for up to 5 years, a fine, or both, for criminal infringement of a copyright where the offense consists of 10 or more public performances by electronic means."⁵⁵ As one can

49. Defendant's Reply Motion, *supra* note 48; *see also* *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 279–284 (2d Cir. 2012).

50. Cutler, *supra* note 48.

51. S. 978, 112th Cong. (2011).

52. *Id.*

53. *Id.*

54. *Id.*; 18 U.S.C. § 2319(b)(1) (2012).

55. S. 978, 112th Cong.

see from the language alone, the penalties amended from the CFS Act would be substantially more severe, essentially raising criminal infringements of copyright from a misdemeanor to a felony. However, the Senate Bill has not been accepted and has been open since 2011,⁵⁶ possibly meaning it is in legal limbo, so to speak.

Although it is not an official name, many people refer to S. Bill 978 as the “Commercial Felony Streaming Act.”⁵⁷ The implications of this increase in punishment will be discussed later, however, it should be noted that the name of the “Commercial Felony Streaming Act” itself defines the authors’ intent. As a short breakdown, first, the term “commercial” is similar to the NET Act, and the bill “includes, within copyright provisions protecting works from criminal infringement, the public performance of a work being prepared for commercial distribution” in addition to the language in 18 U.S.C. § 2319.⁵⁸

Second, as mentioned above, the bill will increase the punishment of imprisonment from “not more than 5 years” to “up to 5 years” changes the status of criminal infringement of copyright to a felony.⁵⁹ It is a little unclear as to whether the language amended only applies to any “person who commits an offense under section 506(a)(1)(A)” as the penalties vary in severity against those who commit an offense under § 506(a)(1)(B) and § 506(a)(1)(C), meaning there is possibility of the expanded criminal copyright provisions to apply to a certain type of criminal copyright infringer.

Lastly, the inclusion of “streaming” in the Act’s title implies Congress’ intention to include streaming from popular websites that host videos on the Internet such as YouTube and Twitch.tv under the Act. The specific addition of “streaming” also shows the legislature’s intent to keep up with rapidly evolving technology. Currently, while streaming copyrighted content without permission can be prosecuted both in a criminal and civil court, the current laws are more geared towards unlawful uploading and downloading of copyrighted content for commercial use, and most of the time, non-commercial uses as well, thanks to the NET Act. However, unlike downloads, live streaming has quite a few differences. Live streaming does the damage directly to as many people as the viewers watching, however, like a double-edged sword, it also limits the infringement to the time of the streaming, albeit any recordings of the stream uploaded for the public to find. In addition, downloading copyrighted content means an unlimited use of the content, while streaming is limited to when it is

56. *Id.*

57. Terry Hart, *Fears of Felony Streaming Bill Overblown*, COPYHYPE (June 7, 2011), <http://www.copyright.com/2011/06/fears-of-felony-streaming-bill-overblown/>.

58. S. 978, 112th Cong. (2011).

59. S. 978, 112th Cong. § 1(a)(1)(B)(2).

being streamed, although it is up to the streamer's discretion as to how often to stream the content.

B. Pros and Cons of the Commercial Felony Streaming Act

After outlining S. Bill 978, the purpose of the Commercial Felony Streaming Act is fairly straightforward with its purpose. Analyzing the pros and cons of the bill may lead to a better understanding of what it sets out to accomplish and if the bill is necessary to the rapidly changing technology boom. Currently, similar to the situation with the LaMacchia Loophole and the NET Act, the CFS Act is supposed to fix a discrepancy with the severity of punishments stated in 18 U.S.C. § 2319.⁶⁰ “Streaming in the basement” is currently considered a misdemeanor under both 18 U.S.C § 2319 and 17 U.S.C. § 506, while selling pirated CDs and DVDs exceeding past the total value of \$2,500 is considered a felony because there is no statutory language for “public performances” in either statute.⁶¹ Certainly, what the bill will address fixes the discrepancy between streaming and commercial copyright infringement, but is streaming so severe that it should be considered a felony? The senators who co-sponsor the bill appear to think so, as streaming is now becoming a very popular and, thus, reaches a larger audience.⁶² On the other hand, the senators are also quick to point out that the bill will not be enforced or was meant to be enforced in situations such as your everyday YouTube video, nor those who consume content from the streaming of copyrighted content.⁶³

However, a slight oversight from this claim by the senators is the fact that streams can be easily recorded by either the one streaming or by the consumer who views the stream. In doing so, whatever is being streamed, regardless of whether it was infringing or not, can be essentially downloaded by a third party as a consequence of the streaming. On streaming websites like YouTube and Twitch.tv, the recordings are usually carefully monitored by the web hosts themselves in order to ensure that the recordings uploaded by users are do not violate their terms of service, which often reflect current copyright laws.⁶⁴ But, in the event that a streamer does stream infringing copyright material, such as a professional sports game or a movie, the possibility that many consumers could potentially “download” the material via their own recording of the stream

60. See generally 18 U.S.C. § 2319 (2012).

61. Ali Sternberg, *Congress Holds Hearings on Unauthorized Public Performance [Part 2 of 2]*, AM. U. INTELL. PROP. BRIEF (June 14, 2011, 8:40 AM), <http://www.ipbrief.net/2011/06/14/congress-holds-hearings-on-unauthorized-public-performances-part-2-of-2/>.

62. *Id.*

63. *Id.*

64. Elizabeth “Boo” Baker, *Important: Changes to Audio in VODS*, TWITCH BLOG (Aug. 06, 2014, 9:20 AM), <http://blog.twitch.tv/2014/08/3136/>.

would violate the NET Act, but not the CFS Act.⁶⁵ In the situation above, the streamer would be liable under the CFS Act and be considered a felon due to the amendments made by the CFS Act. Therefore, in other words, the bill is aimed towards infringing streamers, but not potential consumers of the streaming, which would limit the scope to streamers to those infringers. Potentially, this would be one of the biggest drawbacks as the CFS Act would expand infringing streaming to become a felony, but would not fix the underlying problems of consumers who potentially profit off the streamers regardless of whether it is infringing or not.

Another possible con is the fact that the bill is not meant to target streamers who have no intent to profit with criminal penalties. Like the law before the NET Act, there could be potential for abuse similar to that of the LaMacchia Loophole. Streamers who stream without intent to profit or for any non-commercial purpose would not be liable under the CFS Act. While this is the intent of the authors of the bill, it seems that the idea of creating this bill to make the punishment of infringing streams to become more proportional to the effect it has on commercial interests, not only will consumers not be prosecuted under this bill, but neither will streamers who had non-commercial interests in their streams.⁶⁶ Not to mention that consumers can take advantage of these non-commercial streams and download potentially infringing material from the streams, like copyrighted music used in a video blog, for example. Because of this, the bill seems to be a bit weak due to the narrowness of the bill's scope. Lastly, the bill does not seem to provide any further legislative clarity in the Copyright Act, but rather focuses on limiting illegal streaming of copyrighted content for profit. In the end, the bill sets out to make streamers who infringe copyrighted materials through their public performance become felons and be charged criminally much more successfully, in addition to any civil suits that are brought against them under the current copyright laws.

*C. Is There a Need for the CFS Act,
Despite Current Criminal Copyright Law?*

Current copyright laws to prosecute streamers are quite limited to the laws outlined previously, but the CFS Act aims to expand the criminal penalties of the current laws to create a more proportional punishment to the "crime." It seems, however, that most of the current laws that a copyright owner could use to pursue a copyright infringer have their own set remedies, although they are mostly civil remedies, like injunctions and compensatory damages. For the CFS Act, which sets out to make streaming infringing copyrighted material to

65. S. 978, 112th Cong. (2011).

66. Ali Sternberg, *supra* note 61.

become a felony, it creates avenues for those copyright owners who want to pursue a criminal suit against infringing streamers. The key in comparing the current legislation and that of the CFS Act is in some of the language that it intends to amend. In the current 18 United States Code § 2319, the language punishes those who are willfully infringing for the purpose of commercial gain and/or private financial gain.⁶⁷ This language does not necessarily change whom it targets, as addressed as a con in the previous section, but rather how much it punishes those who are “willfully infringing” for commercial gain or private financial gain. The most important part is the addition of a couple of “phrases” per se that specifically address streaming. First, the language amended to punish those who conduct willful infringement through “public performance by electronic means,” which is almost identical to the language that targets downloading: “the reproduction or distribution, including by electronic means.”⁶⁸ Second, the addition of an extra element in regards to the language that is amended to “total fair market value of licenses of more than \$5,000” that potentially would limit those who are live streaming copyrighted material to serious copyright infringers.⁶⁹

V. CONCLUSION

When looking at the language amended by the CFS Act and seeing that it only increases the idea of punishment alone, how does this compare with the previous trends of the expansion of criminal copyright law or copyright law in general? As observed in the analysis of the NET Act and the DMCA, while rapid innovation in technology and the Internet took place, copyright law was falling behind. However, these Acts changed more than just the punishments of the law at the time they were enacted, and broadened the scope of liability and enforcement of copyright law against infringers respectively. While the CFS Act would appropriately proportion the criminal punishment for streamers who are infringe copyright law, it does nothing more than that. Therefore, upon closer analysis, the CFS Act does not necessarily expand the scope of liability that the trend of the criminalization of copyright law that the previous acts enacted had aimed for. On a more personal observation, it seems like the drastic jumps in penalties are more for deterrence purposes, to perhaps show a “tough on crime” policy to copyright owners.

In the end, this Comment explored the progression of copyright laws and ultimately its expansion as well, to compensate for technology’s evolution. The challenges of downloading copyrighted material were met with the NET Act

67. 18 U.S.C. § 2319 (2012); *see also* Felony Streaming, 157 CONG. REC. 3,968-01 (2011).

68. S. 978, 112th Cong.

69. 157 CONG. REC. 3968-01.

and the intricacies of YouTube are governed by the DMCA. Live streaming websites have now become the next challenge with proposed legislation like S. Bill 978 trying to do what its predecessors have done before; expand criminal copyright law.

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